

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

SCICO TEC gMBh,

Plaintiff

v.

BOSTON SCIENTIFIC CORP.
and BOSTON SCIENTIFIC SCIMED, INC.,

Defendants.

Civil Action No. 9:07 CV 76 (RHC)

BOSTON SCIENTIFIC CORP.
and BOSTON SCIENTIFIC SCIMED, INC.,

Counterclaim Plaintiffs,

v.

SCICO TEC GmbH,

Counterclaim Defendant.

**DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S OPINION
AND ORDER CONSTRUING CLAIM TERMS**

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, Defendants Boston Scientific Corp. and Boston Scientific Scimed, Inc. (collectively "BSC") respectfully lodge the following objections to the Magistrate Judge's August 29, 2008 Opinion and Order Construing Claim Terms of United States Patent No. 5,102,403 ("the '403 patent"), in order to preserve their claim construction positions for purposes of appeal. *See Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 473 (2d Cir. 1985) (failure to file written objections to magistrate judge's ruling waived right to challenge ruling on appeal); *see also Davet v. Maccarone*, 973 F.2d 22, 30-31 (1st Cir. 1992) (same).¹

¹ It is unclear whether the Magistrate Judge's Ruling (which was not styled a "Report and Recommendation") was issued pursuant to Rule 72(a) or Rule 72(b). Pursuant to Rule 72(a), a party may serve and file objections within 10 days of a magistrate judge's order concerning a pretrial matter that is not dispositive of a claim or defense. Pursuant

In particular, BSC objects to the Magistrate Judge's constructions of the following claim terms:

“gradually changing in shape along the catheter body length towards the distal end” (claim 1);
“the outer wall of the catheter body over the length in which the catheter changes gradually and smoothly from a single lumen to a two lumen configuration” (claim 2)
“forming an internal catheter guide wire lumen by changes of shape of the cylindrical catheter body gradually over said length” (claim 9);
“changes in shape gradually” (claim 11);
“gradually changing the circumferential wall configuration” (claim 15);
“gradually changing” (claim 22); and
“changing the groove gradually” (claim 24).

In addition, BSC objects to the Magistrate Judge's decision not to construe the following claim terms:

“substantially cylindrical catheter body” (claims 1, 9 and 18);
“crescent shaped catheter body configuration partly surrounding the wire” (claim 1);
“catheter body” (claim 5, 12, 19 and 22);
“presenting the initial lumen in a crescent shape” (claim 5);
“having a substantially cylindrical catheter body of substantially constant diameter” (claim 11);
“providing a smooth progressive transition from cylindrical shaped provides a groove for guiding the guide wire, to substantially cres[c]ent shape for partly surrounding the wire” (claim 11);;

to Rule 72(b), a magistrate judge may enter a recommendation concerning the disposition of a matter that is dispositive of a claim or a defense. Objections to that recommendation are also to be served and filed within 10 days. Thus, regardless of whether the Magistrate Judge's August 29, 2008 ruling was issued pursuant to Rule 72(a) or Rule 72(b), the parties' objections are to be filed and served on or before September 15, 2008 (in light of intervening weekends and the federal holiday on September 1). *See* Fed. R. Civ. P. 6(a) (when a period prescribed under the Federal rules is less than 11 days, intermediate Saturdays, Sundays and legal holidays are to be excluded in the computation).

“catheter body having a longitudinal groove” (claim 14);
“predetermined length of the catheter” (claims 14 and 19);
“groove having a shape for receiving nested therein” (claim 14);
“cylindrical catheter” (claim 15);
“entrance groove for guiding the wire into a crescent shaped wall section (claim 15);
“cylindrical catheter body” (claim 16);
“indenting the cylindrical catheter body to provide a shaped groove along the length of the body” (claim 16);
“retaining the cylindrical body outer peripheral dimension substantially constant along its length” (claim 18); and
“changing the shape of said cylindrical body and internal lumen along the length of the body to form an indented guide groove” (claim 18).

In support of its objections, BSC relies on the argument and authorities set forth in its February 19, 2008 Responsive Claim Construction Brief (Dkt. No. 50), its April 18, 2008 Letter Brief to the Court (Dkt. No. 67), and at oral argument before the Magistrate Judge on April 10, 2008 (Dkt. No. 70).

Dated: September 15, 2008

Respectfully submitted,

By: /s/ John Nilsson

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 15th of September, 2008, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

George Chandler